

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

76-5029

To be argued by
ARTHUR C. SILVERMAN

**United States Court of Appeals
FOR THE SECOND CIRCUIT**

In the Matter

of

INTERSTATE STORES, INC. formerly known as
INTERSTATE DEPARTMENT STORES, INC., et al.

Debtor-Appellee

DOMINICK'S FINER FOODS, INC.,

Appellant,

and

JOHN E. HANCOCK and AMF INCORPORATED,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF APPELLANT

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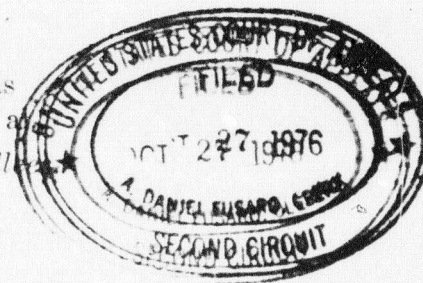


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On Appeal from the United States District
Court for the Southern District of New York

BRIEF OF APPELLANT

Preliminary Statement

This brief is submitted on behalf of appellant Dominick's Finer Foods ("Dominick's") on appeal, pursuant to Section 24 of the Bankruptcy Act (11 U.S.C. §47), from an order of the United States District Court for the Southern District of New York, Judge John M. Cannella, filed July 20, 1976 (7a-17a) * reversing two orders of Bankruptcy Judge Edward J. Ryan, entered May 24 (91a-92a) and June 28, 1976 (495a-496a). Judge Ryan's first order disapproved a conditional contract for the sale of certain real property to appellee John F. Hancock ("Hancock") and approved sale of the property to Dominick's. The second order denied a motion of Hancock and of appellee AMF Incorporated ("AMF"), an intervening creditor, to vacate the prior order of sale. Judge Cannella's opinion and order, and the oral opinions and order of Judge Ryan are contained in the Joint Appendix. None of the opinions is officially reported.

Questions Presented

1. Did Hancock receive adequate notice of the possibility of bidding at the hearing on whether to confirm the proposed sale of the property to him where:

- (a) he was charged as a matter of law with notice that bidding would be permitted;

* "a" references are to the Joint Appendix.

- (b) he had actual and prior notice of probable bidding and therefore suffered no prejudice; and
- (c) the notice conformed to the practice of the court?

2. Did Hancock waive any right to object to the notice of hearing when he attended the hearing; did not object to the notice; participated in the bidding; withdrew from his proposed contract to purchase the property when he found himself the low bidder; and waited three weeks before seeking to assert objections?

3. Was cause shown, pursuant to Bankruptcy Rule 10-209 (b)(4), for the Bankruptcy Judge to limit the class of persons entitled to notice and to shorten the period of notice where:

- (a) the subject property comprised 0.4% of the Debtor's property, and the notice was sent to all creditors who had filed notices of appearance in the action, to all indenture trustees, to the Unofficial Creditors' Committee, to the Senior Subordinated Lenders, and to the Securities and Exchange Commission, but was not sent to all other creditors and stockholders because they numbered in excess of 17,000 persons; and

(b) the normal 20 days notice period was shortened to 14 days in order to accommodate Hancock himself and the Trustees?

4. Did the District Court have authority to vacate the order confirming the sale to Dominick's in the absence of a ruling that the Bankruptcy Judge had abused his discretion or had made clearly erroneous findings?

5. Should the District Court have vacated the order confirming the sale to Dominick's in view of the fact that Hancock did not seek to submit a higher bid until after the bidding had closed, and the approved price to Dominick's was more than adequate as a matter of law?

Statement of the Case and Proceedings Below

This is an appeal from an order of the District Court (Cannella, J., July 1st, 1976; 7a-17a), which reversed two orders of Bankruptcy Judge Ryan entered in proceedings under Chapter X of the Bankruptcy Act to reorganize Interstate Department Stores and its 188 subsidiaries and affiliates (hereinafter collectively referred to as the "Debtor"). The first order of Judge Ryan (May 24, 1976; 91a-92a) approved the sale of certain real property ("the property") of the Debtor to Dominick's Finer Foods, Inc. ("Dominick's"), the appellant herein, which was the high bidder at a hearing held on May 17, 1976 to consider a proposed sale of the property to appellee John E. Hancock ("Hancock"). Judge Ryan's second order, made on the record after full evidentiary hearing on June 28, denied a motion of appellee Hancock and of appellee AMF Incorporated ("AMF"), an intervening creditor, to vacate the prior order approving the sale to Dominick's (495a-496a). Judge Ryan found as a matter of fact that appellee Hancock had ample actual notice of the probability of another bidder's participation at the May 17 hearing, and held as a matter of law that adequate and proper notice of the hearing had been given. Judge Ryan noted that Hancock, at the May 17 hearing, had first participated in the bidding, but later withdrew his offers when Dominick's continued to outbid him.

Judge Cannella vacated the orders of Judge Ryan, set aside the sale to appellant Dominick's, and ordered that the matter proceed de novo in accordance with his opinion. Judge Cannella later denied (August 16, 1976; 18a) the application of appellant Dominick's for a stay pending appeal of any proceedings in furtherance of a new sale. Judge Cannella ruled that in the event his vacatur order is reversed, the Court of Appeals "may direct that the sale [to Dominick's] as confirmed by Judge Ryan on May 24, 1976 be reinstated." Accordingly, the District Court did "not believe that Dominick's will be prejudiced by the lack of a stay." (18a).

Statement of Facts

Events Prior to the May 17, 1976 Hearing.

The Debtor has been under the supervision of the Bankruptcy Court, and more specifically under the almost daily supervision of Bankruptcy Judge Ryan, for over two years.* During that period, Judge Ryan has heard hundreds of arguments, conducted hundreds of hearings, and has

* Chapter X^{re} arrangement petitions were filed on May 22, 1974. A short time thereafter, the Debtor filed an amended petition seeking reorganization under Chapter X of the Bankruptcy Act, and pursuant thereto, trustees of the Debtor (hereinafter "the Trustees") were appointed (285a-286a).

entered close to 350 orders.* He has reviewed numerous reports and studies. It is fair to state that Judge Ryan is generally familiar with the Debtor, its operations, its 9,000 creditors with claims aggregating in excess of \$285,000,000, and its stockholders who number in the thousands (234a, 288a, 335a).

In 1976, the Debtor entered into negotiations to sell one of its many properties to appellee John Hancock for \$650,000 (the appraised value of the property) (447a). A contract, conditioned upon bankruptcy court approval, was executed (23a-66a). A hearing to consider the matter was set for May 17 upon two weeks' actual notice given to Hancock, the Securities and Exchange Commission, the Senior Institutional Lenders, the Unofficial Creditors' Committee, and to the attorneys who had filed formal

* On June 18, 1974, Judge Cannella referred the Chapter X proceedings to Judge Ryan. An amended order was entered on August 14, 1975 which provided, in pertinent part as follows:

"ORDERED, that any and all matters arising in the captioned cases, ... be and they hereby are referred pursuant to the provisions of Rule 10-103 of the Chapter X Rules to the Honorable Edward J. Ryan, as Bankruptcy Judge, to hear and determine and enter orders thereon" (586a)

Judge Cannella directed that copies of proposed orders be provided to him, "other than orders relating to the form of notice of hearing to be given." Id.

appearances during the two years of proceedings (464a-465a).^{*} Accordingly, notice of the hearing was given to several of New York's leading law firms including those which specialize in the area of bankruptcy and creditors' rights.

On May 11, six days before the hearing, the Debtor's Director of Real Estate spoke directly to Hancock and apprised him "that another party was interested in purchasing the property and that if a higher bid was offered he could lose the property." (226a).^{**}

Not later than the next day, May 12, Hancock's lawyer spoke to an attorney associated with the law firm which represented the Debtor's Trustees. The Trustees' lawyer repeated the prior advice given to Hancock. "I ... told him that another party [Dominick's] had expressed an interest in purchasing the property and that they might come into court and that Hancock might lose the property if a higher bid was made." (224a). Hancock's attorney responded that if

^{*} Application for approval was brought on by order to show cause dated April 30, which provided for service of the notice of hearing by May 4 (19a-22a). The notice was actually served on May 3 (72a).

^{**} The Director of Real Estate also "suggested that [Hancock's] attorney appear in Court if he wanted to bid or even authorize [the Trustees'] attorney to bid on his behalf. He [Hancock] said that he would have his attorney take care of it." (226a). Hancock was further "advised that court approval was necessary, but that I did not believe court approval would be a problem unless someone else bid a higher price." (227a) (emphasis added).

Dominick's outbid Hancock by "so much as one dollar", Hancock would withdraw (224a). Hancock's threat to withdraw was repeated on Friday, May 14, and again immediately before the May 17 hearing (224a-225a). As we shall see, Hancock carried out his threat.

The May 17, 1976 Hearing

Hancock and his lawyer were both in Court on May 17 (84a). At the outset of the hearing, counsel for the Trustees reported that Dominick's had previously indicated its intention to attend the hearing and bid for the property, and that this advice had been conveyed to Hancock (81a).*

Dominick's informed the court that it was prepared to purchase the property for \$25,000 more than Hancock had offered to pay, and on terms better than those in the proposed contract with Hancock (82a-83a).**

Hancock's attorney responded: "We don't wish to raise

* The Trustees' attorney incorrectly stated that Hancock was notified of Dominick's interest on May 13 (a mistake reflected in Judge Cannella's opinion; 10a). In fact, Hancock's attorney was notified "[n]o later than" May 12, (224a) and Hancock himself first received word at least as early as May 11 (226a).

** Dominick's was willing to accede to the Trustees' request that there not be an "escrow closing." (82a). Dominick's was present in the courtroom by its attorneys and duly authorized officers who had with them financial statements, certified checks, and directors' resolutions of authorization (82a).

our offer at this time, Your Honor." (84a). The Court twice offered to recess the hearing to give Hancock an opportunity to consider whether to match Dominick's offer (85a-86a). Hancock's attorney rejected the Court's invitation, and once again stated that Hancock would not respond to Dominick's offer (85a).

When Judge Ryan indicated that he intended to approve the terms of the contract, as amended, with Dominick's substituted for Hancock as buyer and with the price increased to \$675,000 (87a-88a), Hancock offered to match the price (88a). Dominick's raised its offer to \$685,000 (88a). Hancock responded with a withdrawal of his offer (88a). Neither Hancock nor his lawyer made any request to adjourn the hearing.*

The Court approved the Trustees' application, and authorized them to consummate the contract with Dominick's for a purchase price of \$685,000 (88a). Dominick's officers and the Trustees' attorneys immediately proceeded to close the contract; it was executed that day, and a downpayment of close to \$50,000 was made (231a-232a).

* Thus Hancock followed through on his threat to back out of his conditional contract. The threat had been repeatedly made, as noted above. Indeed, Hancock testified that his own lawyer had told the Trustees' attorney that if additional bidding were allowed, "then we would back out of our contract" (437a).

Late that night, at about 11:00 P.M. New York time, Hancock telegraphed Judge Ryan and counsel for the Trustees that he was prepared to bid \$725,000 for the property (90a). Treating the telegram as an informal application, Judge Ryan denied it, and on May 24 signed an order formally authorizing consummation of the sale to Dominick's (91a-92a).

This May 24 order was the first of the two orders reversed by Judge Cannella.

The June 28, 1976 Hearing Before Judge Ryan

After the passage of two weeks, Hancock moved by order to show cause to, among other things, set aside the May 24 order approving the sale to Dominick's (145a-146a).

On June 28, Judge Ryan held a full evidentiary hearing (427a-497a). The parties offered testimony regarding (i) the events leading up to the May 17 hearing; (ii) Hancock's knowledge that another prospective purchaser might appear and bid on the property; (iii) the sufficiency of the notice given by the Trustees of the May 17 hearing; and (iv) Hancock's statements that he would withdraw from the proceeding if additional bids were entertained. Hancock testified, as did two disinterested witnesses, i.e., the Debtor's

Director of Real Estate and an attorney for the Trustees.*

Judge Ryan denied the motion, finding as a matter of fact that Hancock had six days' actual notice of the probability of another bidder's participation (478a), and holding as a matter of law that "entirely adequate and proper notice" had been given (495a).

a. Hancock's Actual Notice

Judge Ryan could not have been more emphatic in his finding of fact: the record was clear, said Judge Ryan, that Hancock had received adequate notice that he might be outbid at the hearing.** (478a, 495a). The undisputed testimony of the two disinterested witnesses -- called on behalf of Hancock himself -- established that both Hancock and his attorney had five to six days' actual notice that at the May 17 hearing another party might offer a higher price for the property, resulting in a sale of the property to that person rather than to Hancock (449a-450a, 458a-

* It must be emphasized that, if anything, these two witnesses should be viewed as favorably disposed to Hancock inasmuch as acceptance of his belated \$725,000 offer would have increased the Debtor's estate by \$40,000.

** Hancock's only complaint about the notice procedure was that he did not receive formal notice that there would be bidding (465a-466a, 475a).

459a).*

Hancock did not deny (453a) the testimony of these disinterested witnesses whom he himself had called (443a, 458a). He even corroborated the evidence with his own testimony that he understood that someone would be present at the hearing "to object" (454a-455a).

Judge Ryan, in finding that Hancock had six days' actual notice "that there would be another bidder in the offing" (495a) plainly indicated his disbelief of Hancock's incredible story that the only reason both he and his lawyer had flown to New York from Chicago to attend the May 17 hearing of the bankruptcy court was to hand-carry an order back to Chicago (434a-436a, 440a-441a, 480a).

* Mr. Finkel was Director of Real Estate for the Debtor. His testimony basically reiterated his prior June 21, 1976 affidavit. See supra at 8. In his initial negotiations for the sale of the property he had told Hancock, "that there was always the possibility of someone objecting in court on the hearing date due to the possibility of coming in with a higher price." (444a). He further testified that he informed Hancock on May 11 by telephone that another party "would be coming into court [on May 17] for the possibility of submitting a higher bid to purchase the property." (449a-450a). Finkel further informed Hancock that the May 17 hearing "would be a bidding situation"; that "he or his attorney [should] come into court on the [17th] if they wanted to stay in the running for the property" (450a); and that if they were unable to appear, Finkel would arrange for Interstate's attorneys to enter bids for Hancock if he so desired (450a-451a).

Mr. Rotkin was an associate of Shea, Gould, Climenko & Casey, attorneys for the Trustees. His testimony explicitly confirmed his June 21, 1976 affidavit, namely that he had informed Hancock's attorney by telephone that another party might come into court on May 17 and "offer more and might take it [the property] away." (458a-459a).

b. Sufficiency of Notice

Judge Ryan took testimony as to the propriety of the notice and concluded that it was "entirely adequate and proper" (495a). In summarizing his findings on this point, Judge Ryan described the instant notice as:

"...the notice we have been using in many important matters. It is [the] notice that goes out to the persons who have participated meaningfully in the reorganization proceedings to date. It would be an absurdity to send out 9,000 notices every time anything of importance was to take place in the estate. The notice was entirely proper." (448a) (emphasis added).

Authority for the notice was based upon the Bankruptcy Rules (463a).

It must be emphasized that Hancock was not the party who raised the technical objections that the notice of hearing allegedly had been sent to too few persons or had been served too few days before the hearing (463a). Obviously, Hancock could show no prejudice, for he stood to gain if no outside bidder appeared at the hearing.* In order to raise such objections, however, Hancock's attorney suggested, without any proof, that appellee AMF Incorporated ("AMF"), an intervening creditor, was entitled to notice

* Hancock's attorney agreed with Judge Ryan that "Hancock [is not] complain[ing] that notice wasn't sent out so that competition could come in to try to outbid him." (474a).

under the court's order bringing on the May 17 hearing and that AMF had not received such notice (463a).^{*} The significance, if any, of the statement was not apparent, for AMF refused to state at the hearing whether it would have produced any additional bidders had it received notice, and was unprepared to state that the sale to Dominick's was not for a fair and adequate price (461a-462a).

In response to the confusing suggestions by Hancock and AMF (neither of whom, as noted above, could show prejudice) that the notice was somehow improper, Judge Ryan instructed

^{*} AMF's appearance at the June 28 hearing was not explained. AMF stood to gain only \$40 if Hancock's belated offer of \$725,000 was accepted (461a). Judge Ryan noted that AMF's brief was submitted to the Court without any application and that it incorporated by reference the Hancock papers (460a). AMF declined to participate actively in the hearing (460a). AMF had never before complained about any alleged insufficiency of notice of any sale of any other property of the Debtor, whose assets were being continuously liquidated in numerous sales and transactions over the past two years. Judge Ryan concluded that the sole purpose of AMF's presence was to provide a "person aggrieved" inasmuch as Hancock "certainly is not a person aggrieved." (439a).

the Trustees' attorney to place upon the record the determinative factors as to who had received notice (464a). The attorney explained that the Trustees would have been unduly burdened with sending notice to every one of the 9,000 creditors or 8,000 shareholders because "the costs would be prohibitive in the trustees' judgment"* (465a). Further,

* Mr. Yassky's statement in relevant part was as follows:

"As Your Honor is aware, there are over 9,000 creditors in this proceeding. We have had application on various matters of at least equal importance to this for the past two years, maybe on a weekly basis. We have been sending notice to all persons who filed statements under [Section] 210 or 211 of the Bankruptcy Act or any parties to the particular application. So that we have been sending notices to all parties who have evinced any interest in the proceeding by appearing here throughout the two years or who have filed statements under 210 or 211 of the Bankruptcy Act.

"But we have not sent notice to every creditor or shareholder of every application because the costs would be prohibitive in the trustees' judgment." (464a-465a).

Mr. Yassky further stated:

"The notice of the hearing that went out was not for the purpose of soliciting more indications of interest in the property. The trustees certainly felt that they had done their duty in that regard for quite some time.

"As I said before, to send the notice to all parties certainly would not be in the best interests of the estate." (478a-479a).

since the Trustees had been attempting to sell the property for two years, it was a fair presumption that "any interested party in the entire Chicago area was aware that this property was for sale." (478a).

No one other than AMF, which spoke through Hancock's attorney, objected on these grounds to the notice of the hearing. The Securities and Exchange Commission, which was present at both the May 17 and June 28 hearings, did not object; nor did the attorneys for the Senior Institutional Lenders who were present at the May 17 hearing; nor did the attorneys for the Unofficial Creditors Committee who were present at the June 28 hearing. Indeed, the SEC attorney, emphatically agreed that the notice "was entirely proper." (488a-489a).

c. Judge Ryan's Summary of the Proceedings Before Him

There are no better words to describe the Bankruptcy Court's view of the matter than Judge Ryan's own summary:

"To set aside this sale [to Dominick's] would work a travesty of justice, in my opinion. Entirely adequate and proper notice was given. Anybody with a modicum of intelligence would have to realize that if a higher bid were made in court at that time, it would be considered. I fully credit Mr. Finkel's testimony that he told Mr. Hancock on May 11th that there would be another bidder in the offing. Further, before Mr. Hancock and his attorney entered the courtroom, they

were told clearly that there was going to be bidding. During the sale he was given entirely adequate notice and an opportunity to consider if he wished to meet the higher offer." (495a-496a).

* * *

"[I]f we were to do this every time we have an auction sale or any other type of judicial sale, any time anybody goes home and decides to second-guess, they can just call up the Court or send a telegram and the successful buyer is then deprived of his gain. To me, it's a very simple proposition here." (490a).

Judge Ryan orally denied the application to vacate the May 24 order (495a-496a). This was the second order reversed by Judge Cannella.

Judge Cannella's Decision

In the face of the findings of the Bankruptcy Judge (based upon testimony and evaluation of credibility) that the notice was entirely proper and that Hancock had at least six days' actual notice of potential bidding and had come to New York with his Chicago lawyer to participate in the hearing, Judge Cannella ruled that the notice of the May 17 hearing was insufficient because it failed to state explicitly that competitive bidding would be allowed. The District Court ruled "that it was unfair to expect Hancock to attend the sale prepared for competitive bidding. That the Trustees and others had informed Hancock of this fact less than a week before does not require a different result." (13a).

The District Court also ruled, in response to AMF's newly raised alleged objections, that the notice may not have been served upon enough parties. This ruling was in the face of specific findings by Judge Ryan as to why notice was not served upon the thousands upon thousands of the Debtor's creditors and stockholders. The District Court intimated that notice of the sale of the property might perhaps be required to be published in such papers as The New York Times, The Wall Street Journal, and the New York Law Journal (16a).

The two prior orders of Judge Ryan were summarily reversed, and the matter was remanded for further proceedings. In later denying a stay of said proceedings pending the instant appeal, Judge Cannella dispelled any concern as to the possibility of mootness and ruled that if his vacatur order were reversed, this Court "may direct" that the sale to Dominick's be "reinstated" (18a).

SUMMARY OF ARGUMENT

The Argument has been divided into various points and subpoints, which are gathered together and listed in the Table of Contents. The Point and Subpoint headings are self-explanatory. Accordingly, the Table of Contents itself serves as the Summary of the Argument.

ARGUMENT

POINT I. HANCOCK RECEIVED LAWFUL AND ADEQUATE NOTICE OF THE HEARING

A central issue presented to the court below was whether notice to Hancock of the May 17 hearing was sufficient to apprise him that there might be bidding. The Bankruptcy Judge found that Hancock had "entirely adequate and proper notice" (495a) of possible bidding, and actual notice as well. In contrast, the District Court held that the notice was improper because it did not specify that alternative offers would be considered at the hearing. That Hancock had actual notice of probable bidding "[did] not require a different result," according to Judge Cannella. (13a).

In this point, we will demonstrate: (1) that Hancock was charged as a matter of law with notice that competitive bidding would be permitted; (2) that Hancock's actual and prior notice of probable bidding did amount to adequate notice and he suffered no prejudice; and (3) that the record sharply contradicts District Court's characterization of the notice procedure in Chapter X proceedings in the Bankruptcy Court for the Southern District of New York. Each of these arguments, standing alone, is dispositive of this appeal.

Since the question of the adequacy of the notice as a matter of law is a threshold issue, we begin with an analysis of that issue.

A. Hancock Was Charged as a
Matter of Law With Notice
That Competitive Bidding
Would be Permitted

The notice was adequate as a matter of law, for a proposed sale by a Chapter X Trustee and the bankruptcy court's approval thereof are as a matter of law conditioned upon no higher or better offer being made at or before the confirmation hearing. This basic and essential principle of bankruptcy practice was forcefully articulated by Judge Learned Hand in Freehill v. Greenfeld, 204 F.2d 907 (2d Cir. 1953), which involved a Chapter X proceeding:

"The question at bar therefore comes down to whether the contract [of sale of the debtor's property to the purchaser] should be read to contain the implied condition that the 'approval of the court' meant an approval without exposing the property to public bidding for a better price. We can see no basis for such an interpolation. [The purchaser] knew that he was dealing with a trustee in reorganization under Chapter X; indeed it was only as such that [the trustee] could deal with him at all. By what reasoning he could suppose that he had not subjected himself to whatever conditions the Reorganization Court might impose upon its 'approval,' we cannot understand... . [K]nowing as he did that he was dealing with ... a [Chapter X] trustee, he took his chances on what conditions the court might impose upon its 'approval'."
204 F.2d at 909 (emphasis added).

The rationale of Freehill is that a prospective purchaser, such as Hancock, who deals with a Chapter X trustee, is charged with knowledge of the statute and with informing himself as to the procedures of the bankruptcy court. It is for this reason that the only requirement in the Bankruptcy Rules concerning the content of a notice of proposed sale is that the notice generally describes the property to be sold.*

The well established practice for the sale of property under Chapter X of the Bankruptcy Act (11 U.S.C. §§501-676) and under the Bankruptcy Rules was clear notice to Hancock that court approval of the Trustees' application would not be given without first ascertaining whether there were higher or better bids. The notice of hearing legally placed Hancock on notice that he should expect possible competitive bidding. See In re Gil-Bern Industries, Inc., 526 F.2d 627, 628 (1st Cir. 1975); In re General Insecticide Co., 403 F.2d 629, 630 (2d Cir. 1968) ("[i]t is incumbent upon creditors to follow the record ... and discover for themselves orders which they may want to challenge.").

The disinterested parties below, and even the District Court, were perplexed at Hancock's extraordinary claim that he could plead ignorance of the law and rely on the grossly

* Bankruptcy Rule 10-209(b) provides specifically that:

"The notice of a proposed sale of property, including real estate, is sufficient if it generally describes the property to be sold." (Emphasis added).

incorrect assumption that competitive bidding would not be permitted.* Judge Ryan indicated several times during the July 28 hearing that the expectation at a confirmation hearing is the presence of other bidders. (E.g., 495a). Counsel for the Trustees agreed (478a). Indeed, the SEC attorney, Mr. Feller, an expert in Chapter X reorganization proceedings, stated at the same hearing that he thought:

"[I]t could be presumed when ... a piece of property is up for judicial sale, the Court is, in effect, the seller of the property and is obligated to realize the highest bid, and the fact ... that Mr. Hancock may have perhaps wished that another bidder would not have come in would certainly not preclude the Court to take a higher bid at the hearing. There is no question about that." (489a) (emphasis added).

All but the District Court rejected Hancock's astounding claim and concluded that the notice of the hearing was entirely proper and normal. Only the District Court concluded that Hancock's alleged confusion resulted from an improper notice.

* Judge Cannella, in asking Mr. Feller from the SEC whether he thought the notice was sufficient, stated:

"What bugs me about the notice is how can you restrict a notice like that? How can you make a rubber stamp out of the Court? It doesn't seem to me, under bankruptcy [Act and Rules], you can say you are going to have such a deal and all you have to do is listen to the Court say, 'Yea, that is fine.'" (513a-514a; see also 508a-509a) (emphasis added).

The only correct conclusion, of course, was that as a matter of law Hancock and his attorney were charged with knowledge that the bankruptcy court would entertain higher and better bids. Hancock is in no position to avoid the Freehill rule by claiming, as did the frustrated purchaser in In re General Insecticide Co., 403 F.2d 629 (2d Cir. 1968), that the Trustees specifically represented that no higher price would be obtained at the sale. The District Court at bar simply had no basis in law for its holding that Hancock was somehow confused and placed in an "unfair" position at the May 17 hearing (13a, 14a). The District Court erroneously ignored Judge Ryan's simple, but telling summary of this issue:

"[A] hearing on an offer means that that offer is up either to be accepted or not, and one of the reasons it will not be accepted is if a higher bid comes in. That's all that happened here. It's that simple." (488a).

B. Hancock's Actual Notice
of Probable Competitive
Bidding Was Adequate Notice

Even assuming -- without for one moment conceding -- that the notice may have left a technically open question in Hancock's mind, the matter was mooted by Hancock's actual knowledge for many days prior to the hearing of the near certainty of Dominick's attendance and bidding. This actual notice was more than "sufficient to satisfy the procedural

requirements of the Bankruptcy Act". In re DCA Development Corporation, 489 F.2d 43,47 (1st Cir. 1973). The District Court erred in giving such actual notice no weight.

Hancock's receipt of actual notice long prior to the hearing* and his participation at the hearing should be the end of the matter, see Pullman Couch Co. v. Eshelman, 1 F.2d 885 (4th Cir. 1924), cert. denied, 266 U.S. 631 (1925), particularly where such notice and participation eliminated any claim of prejudice which Hancock might otherwise assert. Cf. In re Gil-Bern Industries, Inc., 526 F.2d 627, 628 (1st Cir. 1975) (dictum); In re Marathon Foundry & Machinery Company, 239 F.2d 122, 129 (7th Cir. 1956), cert. denied, 353 U.S. 912 (1957).

In re DCA Development Corporation, 489 F.2d 43 (1st Cir. 1973), involved a Chapter XI creditor who sought to bar an exchange of the debtor's assets on the ground, among others, that the hearing on the matter was held on only one day's notice. The court rejected this contention, in part because the creditor's attorney had attended the hearing.

* The District Court implicitly affirmed (13a) the findings of Judge Ryan that Hancock received six days' actual notice (478a). Judge Ryan also found that Hancock received additional actual notice immediately prior to the May 17 hearing (495a-496a).

The court explained that:

"[E]ven where formal notice to affected parties is omitted or is insufficient, informal or constructive notice which provides them with the same opportunity for a fair hearing can satisfy the procedural requirements of the Bankruptcy Act. See, e.g., *Ferguson v. Bucks Country Farms, Inc.*, 280 F.2d 739, 743 (3rd Cir. 1960); *Harris v. Capehart-Farnsworth Corp.*, 207 F.2d 512, 517 (8th Cir. 1953); *Kattelman v. Madden*, 88 F.2d 858, 863 (8th Cir. 1937); *In re Eatsum Prods. Corp.*, 286 F. 447, 448-449 (S.D. Fla. 1923)." 489 F.2d at 47 (emphasis added).

Similarly in *Pullman Couch Co. v. Eshelman*, 1 F.2d 885 (4th Cir. 1924), cert. denied, 266 U.S. 631 (1925), the court rejected the argument of an objectant who participated in a creditors' meeting that creditors had not received formal notice of the meeting. The court stated that:

"The only purpose of the requirement that there should be a petition and notice to creditors is to give creditors opportunity to be heard That purpose was met when the objecting creditor at a legal meeting of creditors . . . [participated] . . . without objection of lack of petition or due notice." 1 F.2d at 887 (emphasis added).

Even where the notice of hearing contains inaccuracies or mistakes -- which is not the case at bar -- the sale will not be set aside so long as the objectant receives actual notice. See, e.g., *In re Weeks*, 4 F. Supp. 558 (N.D. Texas 1933), aff'd sub nom., *West Texas Const. Co. v. Nelson*, 77 F.2d 754, 755 (5th Cir. 1935); see also Point V(A) infra.

The persuasive case law concerning the effect of actual notice should make clear the dispositive error of the District Court in failing to give any weight to Hancock's actual notice.* Indeed, the juxtaposition by the District Court of an acknowledgment of Hancock's actual notice of the expected bidding with a statement that the hearing was nevertheless somehow "unfair" to Hancock because a bidder in fact appeared (13a, 14a) evidences an illogic which we believe permeates the entire opinion below.

C. There Is No General Practice In
 The Southern District of New York
 Which Suggests That The Notice
 Should Have Been Worded Differently

The record clearly refutes the District Court's finding of an "uncontradicted claim ... that it is the general practice in this district for the notice to recite that an offer has been made and that other bids will be accepted on or before the return date." (14a).**

* The District Court stated that:

"In this posture, this Court finds that it was unfair to expect Hancock to attend the sale prepared for competitive bidding. That the Trustees and others had informed Hancock of this fact ... does not require a different result." (13a).

** There is little doubt that the comparison to the other proceedings was a basis for the District Court's vacatur and remand. The opinion reads:

"It is therefore appropriate to assure that all parties be accurately informed as to the procedures to be followed. [citation omitted] This conclusion is bolstered by the uncontradicted claim ... [of the allegedly differing notice practice in the district]." (13a-14a).

Judge Ryan handles a substantial portion of all bankruptcy matters in the busiest bankruptcy court in the nation. He is the co-author of the well regarded Collier's Forms Manual for practice in the bankruptcy courts. In the Interstate proceedings alone, Judge Ryan has entered 350 orders over the past two years. Judge Ryan ruled that the notice at bar was "entirely proper" (495a), and that it was the notice which "we have been using in many important matters" (448a). These facts necessarily suggest error in the District Court's assertion that the notice of the May 17 hearing did not conform to the "general practice." (14a).

Judge Ryan rejected Hancock's argument -- made some seven weeks after service of the notice -- that the notice in the case at bar should have been tailored to notices used in an unrelated proceeding (the W. T. Grant case) involving clearly different circumstances and cost factors (438a). Also properly rejected by Judge Ryan was Hancock's incorrect assertion that various forms for notices of sale allegedly contain language indicating that higher or better bids will be entertained. The Judge found that the forms in well regarded texts do not contain such language* (488a).

* Hancock incorrectly identified various forms of notice for auctions or open bidding for sales as evidence of "a customary practice, in this District and nationwide ... to recite that an offer to purchase has been made and that other and higher bids will be accepted on the return hearing date." (Hancock's "Memorandum" before the District Court at 8). None of the forms cited by Hancock contained this recitation or any other "magic words". Indeed, the only form cited and pertinent to the instant situation, i.e., a "Notice of Hearing on Petition for Confirmation" did not indicate that bidding might occur at the hearing. Forms, Remington, Bankruptcy, Form No. 717 at 337 (6th ed. 1955).

In any event, forms cited by Hancock pertained to ordinary bankruptcy proceedings and to Section 58(a) of the Bankruptcy Act (11 U.S.C. §94)), a provision which does not control notice procedures in a Chapter X proceeding. See infra at 46.

Judge Ryan's view of general notice practice was shared by Mr. Feller, the SEC expert in Chapter X proceedings, who emphatically agreed that notices of sale do not usually contain specific language that possible competitive bidding will be allowed (488a-489a). Mr. Feller similarly shared his expertise with Judge Cannella as follows:

"I don't think the fact that it's not contained in the form of notice, the magical phrase 'or any other higher bidder', that Hancock or anyone else could come in to court assuming that he would have gotten the property in the event that a higher bidder were to come in." (514a).

The District Court thus had clear, substantial and unbiased evidence from the Bankruptcy Judge, the Trustees' counsel and from the SEC Chapter X expert (tantamount to "admissions against interest") that the practice in the district did not require that notices of confirmation of sale include specific mention that higher bids would be considered. It is respectfully submitted that such evidence overwhelmingly outweighs any inference drawn by Judge Cannella from the use of such words in isolated notices in two other proceedings, one in the Southern and one in the Eastern District, both with different facts and circumstances than here.

Relying as it did, on an erroneous view of the general notice practice, we demonstrate in Point IV, infra that the District Court proceeded improperly to usurp the discretion and fact finding prerogative of the Bankruptcy Judge, mandated by statute, and to remand the case with instructions to follow the notice procedures used in the two unrelated proceedings to which Judge Cannella seemed to be drawn (16a).

POINT II.

HANCOCK WAIVED ANY POSSIBLE
OBJECTION TO THE ENTER-
TAINMENT OF OTHER BIDS AT
THE MAY 17 HEARING

Hancock waived any possible objection to the conduct of the May 17 hearing, to the notice procedures used for it, and to Dominick's participation therein by: (1) not objecting to Dominick's bidding, (2) affirmatively participating in the bidding, (3) declining Judge Ryan's offers of a recess to permit Hancock to consider Dominick's bid, and (4) withdrawing from the proceeding when the Hancock bid was bested (84a-88a).

Indeed, immediately after Dominick's presented its higher and better offer and Judge Ryan asked whether Hancock wished to be heard, Hancock's attorney stated: "We have no further comment except that we have our [written] offer."

(84a). Thereafter, Hancock withdrew from the proceedings (88a), thus carrying out Hancock's promise prior to the hearing to "back out of our contract" if Dominick's offered a higher price (437a). Hancock's waiver is crystal clear.

The law is well settled that even if there has been a deficient notice of a hearing -- which is not the case here -- a party who participates fully in the hearing has waived

any possible objection.* E.g., In re Burr Mfg. & Supply Co., 217 F. 16, 20 (2d Cir. 1914); accord, In re Inter-City Trust, 295 F. 495, 497 (1st Cir. 1924), cert. denied, 265 U.S. 589 (1924) (petitioners lacked "standing"); In re Weeks, 4 F. Supp. 558, 560 (N.D. Texas 1933), aff'd sub nom., West Texas Const. Co. v. Nelson, 77 F.2d 754 (5th Cir. 1935); Gurewitz v. Wise, 122 Me. 444, 120 A. 536, 537 (1923). See also 3 Collier, Bankruptcy, §58.05 at 505, and n.43 (14th ed. 1975) ("It has been held that where a creditor has actual knowledge of the bankruptcy proceedings in time for him to protect his rights, his claim will be discharged, although he did not receive notice of the first meeting of creditors.")

This Court's statement of the principle is particularly apt to the instant proceeding:

"Even in the case of serious irregularities, a party loses his right to object by failing to make timely protest. If he has knowledge of the defects prior to confirmation, and makes no protest, he loses his right by his laches, and cannot come in afterwards with a request to have the proceeding vacated." In re Burr Mfg. & Supply Co., 217 F. 16, 20 (2d Cir. 1914) (emphasis added).

Even where actual notice to a party would not otherwise cure a defective notice, participation in the proceeding is held to negate the defect. In re Weeks, 4 F. Supp. 558

* Some of the cases use terms other than "waiver" to characterize this result. E.g., In re Caldwell, 178 F. 377 (S.D. Ga. 1910) ("estoppel"); In re Burr Mfg. & Supply Co., 217 F. 16, 20 (2d Cir. 1914) ("laches").

(N.D. Texas 1933) aff'd sub nom., West Texas Const. Co. v. Nelson, 77 F.2d 754 (5th Cir. 1935). In that case, the creditor, living in Dallas, received a "poorly worded" and contradictory notice of a proposed sale of property to be held in Wichita. Ignoring the notice, the creditor did not attend the meeting. However, he did have actual notice of the meeting through an attorney who occasionally represented him, and who in fact did attend the hearing. The court properly found that the creditor had waived his objections because he had failed to protest the notice when his lawyer participated in the hearing.

Similarly at bar, Judge Ryan found that Hancock had at least six days' actual knowledge -- repeatedly received -- that to a near certainty another bidder would enter the proceedings. This was ample time for Hancock to prepare for the hearing and to determine his course of action. He did prepare for the hearing, his protestations to the contrary, as evidenced by his attendance with his Chicago lawyer, his subsequent participation in the hearing, and the withdrawal of his offers. Moreover, he never protested Dominick's

presence, nor objected to Dominick's bidding.* Waiver is clear on the face of this record.

* Dominick's also argues that Hancock is estopped to object to the sale of the property to Dominick's. Hancock had met Dominick's first bid of \$675,000. Relying on Hancock's participation, Dominick's raised its own bid to \$685,000. Accordingly Dominick's bid \$10,000 more than it otherwise would have bid, had Hancock not met Dominick's opening bid of \$675,000. Dominick's, therefore, changed its position prejudicially in reliance upon Hancock's participation in the bidding. Dominick's had no idea that Hancock would thereafter withdraw his first bid. See, e.g., New York State Guernsey Breeders' Co-op v. Noyes, 260 App. Div. 240, 248, 22 N.Y.S.2d 132, 140 (3d Dep't 1940), modified, 284 N.Y. 197, 30 N.E.2d 471 (1940); Reynolds v. Gorton, 30 Misc.2d 216, 221, 213 N.Y.S.2d 561, 568 (Sup. Ct. Oneida County 1960).

POINT III. CAUSE WAS SHOWN PURSUANT TO
BANKRUPTCY RULE 10-209(b)(4)
FOR THE BANKRUPTCY JUDGE TO
LIMIT THE CLASS OF PERSONS
ENTITLED TO NOTICE AND TO
SHORTEN THE PERIOD OF NOTICE

NOTE: At the outset of this point, we point out that it is directed solely to objections raised by the intervenor creditor appellee, AMF. Hancock has no standing to raise the issues dealt with in this point (see supra at 14-15, 17).^{*} We also emphasize that the AMF objections dealt with here were not supported by the SEC, the Senior Institutional Lenders, the Unofficial Creditors' Committee, or anyone else. AMF's good faith in advancing the objections is subject to serious question, as we have shown hereinabove.

* * *

Pursuant to Bankruptcy Rule 10-209(b)(4), the Bankruptcy Judge properly approved a notice procedure which limited the number of recipients of the notice and shortened the normal 20-day notice period.

Rule 10-209(b)(4) provides in pertinent part that:

"(b)...[T]he trustee ... shall give all creditors, stockholders, and indenture trustees, at least 20 days' notice by mail of ... (4) any proposed sale of property, other than in the ordinary course of business ... unless the court for cause shown shortens the time or orders a sale without notice". (Emphasis added).^{**}

^{*} It should be noted that during the June 28 hearing, Hancock specifically denied that he objected to the number of creditors who received notice (465a). Hence, the deus ex machina in the form of AMF's appearance at the June 28 hearing for the first time in the proceedings.

^{**} The power of the Bankruptcy Judge to order a sale without notice a fortiori reserves its power to limit the class of persons receiving notice or to provide for less than 20 days notice. See, e.g., In re Black Watch Farms, Inc. 373 F. Supp. 711, 714 (S.D.N.Y. 1974).

The Bankruptcy Judge complied with Rule 10-209(b)(4). Cause was shown for the Trustees' notice procedure: (1) in the record at bar; and (2) in facts contained in the entire record of the Debtor's reorganization proceedings which were well known to Judge Ryan from his two years of supervision of the proceedings, and accordingly were judicially noticed by him. These facts are evidenced by findings and conclusions made at the June 28 hearing. Thus it is difficult to find any support for the District Court's conclusion that there was no compliance with Rule 10-209(b)(4).*

A. Cause Was Shown For Sending
Notice of Sale to a Limited
Class

The testimony at the June 28 hearing, affidavits submitted thereat, and Judge Ryan's findings demonstrate conclusively why the notice of hearing was sent to all the creditors who had filed notices of appearance in the action,

* In view of the clear record facts, Dominick's is unable to comprehend an apparently critical sentence in the District Court's opinion:

"In any event, it is clearly inconsistent with the words and import of Rule 10-209(b)(4) to order a sale of property without notice to the creditors and stockholders without a finding by the judge that such notice would be inappropriate in the circumstances." (15a).

Perhaps the Court meant to write "appropriate" and not "inappropriate"; or perhaps the Court meant that the bankruptcy judge must find that "such notice" to the creditors and stockholders is "inappropriate". In any event, the Bankruptcy Judge clearly did find that the notice to the selected class of creditors was "adequate" and "entirely proper". The only logical implication of this finding is the converse, namely that notice to all the creditors and stockholders was "inappropriate".

to all indenture trustees, to the Unofficial Creditors' Committee, to the Senior Subordinated Lenders, and to the SEC, but was not sent to other creditors and stockholders who numbered in excess of 17,000 persons. Simply put, "the costs" to send notice to every creditor and shareholder "would [have been] prohibitive in the trustees' judgment." (465a).

Counsel for the Trustees explained the criteria for selecting the persons who received notice:

"[W]e have been sending notices to all parties who have evinced any interest in the proceeding by appearing here throughout the two years or who have filed statements under 210 or 211 of the Bankruptcy Act." (465a).

Judge Ryan also undoubtedly relied upon, among other things, his own extensive two years of experience in the proceedings which involved 189 debtors; 9,000 creditors with aggregate claims of over \$285 million; several thousand shareholders; and frequent liquidation sales and transactions (234a).

Relying on his experience in this proceeding, and on his extensive experience and expertise generally in other Chapter X proceedings, Judge Ryan found that "It would be an absurdity to send out 9,000 notices every time anything of importance was to take place in the estate. The notice was entirely proper." (488a). The Judge concluded that the notice was sent "to the persons who have participated

meaningfully in the reorganization proceedings to date."

(488a). He specifically grounded his power to make such a determination on the Bankruptcy Rules (463a).

B. Cause Was Shown for Shortening
The Normal Twenty Days Notice
Period to Fourteen Days

As the record clearly demonstrates, the normal 20 days notice period was shortened to 14 days in order to accommodate Hancock himself. The fact is self-evident from an examination of the conditional contract entered into on April 20 between the Trustees and Hancock (23a-52a). The contract provided that closing was not to take place until entry of an order of the Bankruptcy Court followed by the expiration of the ten-day appeal period (24a, 33a). The conditional contract also provided that in any event, title was to pass by June 1 (24a).

An analysis of these facts will show that at the time the application was made on April 29, it would have been impossible to comply with the twenty day provision of the Bankruptcy Rules, unless Hancock was prepared to waive the June 1 date. The order to show cause setting the hearing was signed on April 30, 1976, and provided that notice of the application be served on or before May 4, 1976 (71a). The notice of hearing on the application was dated May 3, 1976, and the hearing was scheduled for May 17 -- two weeks later (72a). On May 17 no one requested an adjournment (79a-89a). It is obvious that had 20 days' notice been given

from May 3, the hearing could not have taken place until May 23 and the ten day appeal period would not expire until some time in June, after the June 1 deadline for closing provided in the conditional contract itself.

Cause was clearly shown, therefore, for shortening the 20 day period. Although Judge Ryan made no explicit finding for the shortened notice discussed above,* the "cause" for shortened notice was obvious from the face of contract attached to the Trustees' application. In re L. M. Axle Co., 3 F.2d 581, 582 (6th Cir. 1925).

C. A Full Record Was Made
At The June 28 Hearing.

If the District Court intended to suggest that cause is shown under Bankruptcy Rule 10-209(b)(4) only if the findings are made when the notice is approved,** this suggestion is contradicted by case law. E.g., In re DCA Development Corporation, 489 F.2d 43 (1st Cir. 1973).

* There was no occasion to make explicit findings with respect to the shortened period. The shortened period was essential to Hancock's pursuit of the purchase, and he naturally did not mention it -- not until he appealed Judge Ryan's decision. See Hancock's "Memorandum" before the District Court at 8.

** The District Court stated that:

"[I]t is clearly inconsistent with the words and import of Rule 10-209(b)(4) to order a sale of property without notice to creditors and stockholders without a finding by the judge" (15a) (emphasis added)

In the DCA case, a secured creditor challenged a transfer of the debtor's assets on the ground that the referee had violated Fed. R. Civ. P. 52(a) by failing to include sufficiently detailed findings of fact in his order approving the transfer. The referee, however, had included sufficiently detailed findings in his certificate to the district court. The creditor contended that the referee's failure to set forth adequate findings on the face of the order itself could not be cured in a later certificate, but required a remand of the case. The First Circuit relying on well established law rejected this approach, holding that the referee's later findings "insur[ed] that the court had a complete understanding of the reasons behind the order." 489 F.2d at 48. The court found this approach consistent "with the purposes of the Bankruptcy Act, which require flexibility and efficiency" and explained that:

"[I]f we did remand, the referee presumably would only restate the findings now included in the certificate, so that nothing of substance would have been gained. It is, of course, of the utmost importance that the referee support his orders with adequately-stated findings of fact so that the courts can review them.* Ordinarily such findings should accompany the orders. However, we agree with the Sixth Circuit that where, as here, findings of fact in the referee's certificate supplement those in his initial order so as to provide the district court with a complete understanding of his reasons, the requirements of Fed. R. Civ. P. 52(a) have been satisfied. See In re D.I.A. Sales Corp., 339 F.2d 175 (6th Cir. 1964)." 489 F.2d at 48 (emphasis added).

* The First Circuit in a footnote stated:

"A second reason for requiring findings of fact is to enable parties that are unhappy with a result to know whether they have a basis for appeal". 489 F.2d at 48.

The DCA rule is even more aptly applied in the instant case inasmuch as the Bankruptcy Judge made his findings during, and not after, the proceedings. Further, DCA dispells any suggestion that Bankruptcy Rule 10-209(b)(4) requires findings at the moment the order is issued. Any different result would be, as the DCA court pointed out, arbitrary and foreign to the everyday practice of bankruptcy and reorganization proceedings and to the purpose of the Bankruptcy Act. It is sufficient, as was the case in DCA and as is the case at bar, that the parties have been provided a fair chance to appeal, and the appellate court an adequate basis to review the lower court's decision. See generally 5A Moore's, Federal Practice §52.06[1] nn. 19,20, 22 (2d ed. 1975). E.g., Commercial Molasses Corp. v. New York Tank B. Corp., 114 F.2d 248, 250 (2d Cir. 1940) (L. Hand, J.) (a judge's "conclusions" are to be considered "findings"), aff'd, 313 U.S. 541 (1941).

The nub of the matter is that there is no merit to any possible theory that explicit findings in support of "cause shown" should have been made on April 30 when the order bringing on the May 17 hearing was signed. What is dispositive here is that cause in fact existed, was demonstrated, and was evidenced by findings of fact and conclusions of law timely made.

POINT IV.

THE DISTRICT COURT DID NOT
HAVE THE AUTHORITY TO USURP
THE PREROGATIVE OF THE
BANKRUPTCY JUDGE TO DETER-
MINE QUESTIONS OF FACT AND
TO FIX NOTICES OF HEARING

We have demonstrated that the Bankruptcy Judge found as a matter of fact and of credibility that (i) Hancock had six days' actual notice that at the May 17 hearing "there would be another bidder in the offing"; (ii) that immediately prior to the hearing Hancock and his lawyer were again "told clearly that there was going to be bidding"; and (iii) that at the hearing Hancock was given "an opportunity to consider if he wished to meet the higher offer" (495a-496a). It is undisputed that Hancock brought his lawyer from Chicago to New York City, and that the attorney told the Trustees prior to the hearing that if bidding was permitted, Hancock would "back out of" the contract (437a) -- which is exactly what Hancock did. The Bankruptcy Judge plainly disbelieved Hancock's story that he and his lawyer had travelled over a thousand miles to New York City to attend a hearing which Hancock allegedly thought would be a mere "formality" to rubber-stamp the contract (435a). The Bankruptcy Judge also gave no credence at all to the story that both Hancock and his lawyer had come to New York solely as messengers "to take the final order ... and get it back to Chicago Title as quickly as possible" (435a).

Given the findings of the Bankruptcy Judge and the testimony of Hancock, the District Court clearly erred in substituting, in effect, its own findings that the hearing was "unfair" and that weight should have been given to "Hancock's protestations that he was unprepared for ... [the] eventuality [of bidding]." (14a).

The District Court was required under Bankruptcy Rule 810 to:

"... accept the ... findings of fact [of the bankruptcy judge] unless they are clearly erroneous, and shall give due regard to the opportunity of the [bankruptcy judge] to judge the credibility of the witnesses."*

The purpose of the rule, according to the Advisory Committee Notes thereon, is to:

"Require [that] the same effect ... be given the referee's findings as Rule 52(a) of the Federal Rules of Civil Procedure accords to the findings of the trial court."

It is respectfully submitted that the District Court violated Rule 810 in disregarding the findings of fact of the Bankruptcy Judge as, under no stretch of imagination, were those findings "clearly erroneous."

That controlling weight must be given to the findings of a bankruptcy judge has been the law of this Court, e.g., Simon v. Agar, 299 F.2d 853 (2d Cir. 1962), and elsewhere. E.g., Gross v. Fidelity & Deposit Company of Maryland, 302 F.2d 338 (8th Cir., 1962) (Held: reversible error to set

* Rule 810 is incorporated into the Chapter X rules by Rule 10-801.

aside findings of bankruptcy referee that were not clearly erroneous). This Court also addressed the matter in Stim v. Simon, 284 F.2d 58,60 (2d Cir. 1960):

"[T]he making of findings of fact on disputed testimony is the primary function of the referee ... the [district] judge is required to accept the referee's findings of fact unless they are 'clearly erroneous'."

Accord, In re C. T. Villa Carting Company, 191 F. Supp. 134, 135 (W.D.N.Y., 1961) ("...[R]eview of the entire record fails to show any error on the part of the Referee in accepting the version of the facts supporting confirmation of the sale, much less the clear error needed to override findings of facts underlying his orders.")

In addition to substituting new findings for those of the Bankruptcy Judge, error was committed when the District Court, on a matter within the discretion of the Bankruptcy Judge, substituted its own view as to the requisite content of the notice of hearing.*

The District Court, acting as an appellate court under Part VIII of the Bankruptcy Rules, and pursuant to notices of appeal filed by Hancock (134a, 137a) and AMF (136a), had no authority to substitute its own view of notice, nor did it have

*While the District Court appeared at first to recognize the discretion of the Bankruptcy Judge, the court immediately contradicted itself as follows:

...[I]n that the Rule [B.R. 10-607] provides for whatever notice the judge deems necessary, the Court believes it was unfair to permit open bidding... ." (14a).

authority to instruct Judge Ryan as to notice procedures on remand unless the May 3 notice of hearing was based upon clearly erroneous findings (which we have shown not to be the case) or was otherwise erroneous as a matter of law. E.g., In re Realty Foundation, Inc. 75 F.2d 286, 288 (2d Cir. 1935) (reversing district court for improper substitution of discretion); In re Orpheum Circuit, Inc., 20 F. Supp. 101 (S.D. N.Y. 1937); accord, In re Duvall, 103 F.2d 653 (7th Cir. 1939)*

The reason for not permitting the district court to interfere with the bankruptcy judge on a matter of discretion, unless there has been such abuse as would warrant reversal by an appellate court, is that the bankruptcy judge is "the principal judge of the bankruptcy court." Notes of the Advisory Committee on the Preliminary Draft of the Bankruptcy Rules, 2 Collier's Pamphlet Edition of the Bankruptcy Act and Rules 751, 753 (1976 ed.). Moreover, at bar, the District Court had specifically referred to Judge Ryan

*Cf. In re Long Island Properties, 150 F.2d 313 (2d Cir. 1945); Frank v. Drinc-O-Matic, Inc. 136 F.2d 906 (2d Cir. 1943); Gross v. Bush Terminal Co., 105 F.2d 930, 931 (2d Cir. 1939); accord, In re Garvin Properties, 411 F.2d 594, 595 (5th Cir. 1969) ("In corporate reorganization proceedings ... a reviewing court is confined to determination of whether the trial court abused its discretion to the extent of manifest disregard of right and reason"); Shlensky v. H. R. Weissberg Corporation, 410 F.2d 1182, 1185 (7th Cir.), cert. denied, 396 U.S. 834 (1969), (approving Chapter X court's order of sale which "having been confirmed, can only be set aside for an abuse of discretion").

all matters in the Interstate Chapter X proceedings "to hear and determine and enter orders" (536a). The referral order is explicit in leaving to Judge Ryan all matters pertaining to notice. See footnote at 7, supra.

Under these circumstances, the Bankruptcy Act and Rules clearly vested Bankruptcy Judge Ryan with full authority to fix the terms of the notice of sale at bar, and granted him discretion to fit the notice format to the proceeding. See Bankruptcy Act, Sections 116(3), 120 and 207 (11 U.S.C. §§516(3), 520, and 607); Bankruptcy Rules 10-103, 10-607(b), and 10-901 (incorporating by reference Rule 907).* See also

* Section 207 of the Bankruptcy Act (11 U.S.C. §607) generally empowers the court (here the Bankruptcy Judge) to designate "the matters in respect to which ... and the form and manner in which notice shall be given."

Rule 10-607(b) provides in pertinent part:

"The court may, on such notice as it may direct and for cause shown, authorize the trustee ... to ... sell any real ... property of the debtor, on such terms and conditions as the court may approve."

Rule 907 (an almost verbatim recital of Section 120 of the Bankruptcy Act (11 U.S.C. §520)) provides:

"Whenever notice is to be given under these rules, the court shall designate, if not otherwise specified herein, the time within which, the persons to whom, and the form and manner in which the notice shall be given."

Section 1(9) of the Bankruptcy Act (11 U.S.C. §1(9)) provides:

"'Court' shall mean the judge or the referee of the court of bankruptcy in which the proceedings are pending."

See also Bankruptcy Rule 902(4): As used in the Federal Rules of Civil Procedure, "'District Court', 'trial court', 'court', or 'judge' means bankruptcy judge."

In re DCA Development Corporation, 489 F.2d 43, 46 (1st Cir. 1973) (referring to Chapter XI provisions which, concerning the sale of property, are analogous to provisions under Chapter X) where the court stated:

"The Bankruptcy Act generally grants the referee and the district court considerable discretion on this matter [of notice] ... [T]hese provisions merely require such notice and opportunity for a hearing as is reasonable and appropriate in each particular case. [Citing Chapter X decisions]." (emphasis added).

"Thus desired flexibility relative to notice is provided for Chapter X cases." 6 Collier, Bankruptcy §3.39 at 688 (14th ed. 1972).*

Bankruptcy Rule 10-209(b) sets the only limit on the content of a notice for hearing on the proposed sale of real property: "The notice ... is sufficient if it generally describes the property to be sold." A description of the property indisputably was included in the notice at bar. The notice gave the time and place of hearing and the subject matter thereof. We have demonstrated hereinabove that, as a matter of law, a hearing to confirm a sale of assets charges the contracting parties with knowledge of the possibility of competitive bidding. See Point I(A), supra. We have further demonstrated that the notice at bar was in accord with notice practice generally in the district. See Point I(C), supra.

* Indeed, the notice framework of Chapter X gives the bankruptcy judge far more flexibility than he has under straight bankruptcy. See Comment to Bankruptcy Rule 10-201; 6 Collier, Bankruptcy §3.39 at 688-689 n. 4 (14th ed. 1972).

It is therefore obvious, upon the authority cited above and in view of common sense requirements of day-to-day Chapter X proceedings, that the District Court overstepped the bounds of its appellate authority in: (1) vacating the confirmation of sale because of a mistaken belief that the notices in other Chapter X proceedings may have been more "fair"; (2) interfering with the discretion of the Bankruptcy Judge; (3) substituting new findings of fact for findings which were not "clearly erroneous"; and (4) instructing Judge Ryan to follow the procedure of another bankruptcy judge.

The issue before this Court, as an appellate court, is precisely the same as was before Judge Cannella; to wit, whether the Bankruptcy Judge abused his discretion or made findings which were "clearly erroneous." Morris Plan Industrial Bank v. Henderson, 131 F.2d 975 (2d Cir. 1942) (Hand, L.) where this Court stated:

"The first question is as to the extent of our review: whether the case comes before us as it came before the district judge, or whether he had a larger latitude in reviewing the [bankruptcy] referee's findings than we have We therefore hold that the question is the same in this court as it was in the district court." 131 F.2d at 976-977.

Accord, Union Bank v. Blum, 460 F.2d 197 (9th Cir. 1972); In re Souder, 449 F.2d 284 (5th Cir. 1971); In re George W. Meyers Co., 448 F.2d 1260 (3d Cir. 1971); Kenneally v. First National Bank of Anoka, 400 F.2d 838 (8th Cir. 1968), cert. denied, 393 U.S. 1063 (1969). Since there was no

abuse of discretion by the Bankruptcy Judge, and his findings were amply supported by the record, the order of approval of the Bankruptcy Judge must be reinstated. E.g., Allen v. Union Transfer Co., 152 F.2d 633 (10th Cir. 1945), cert. denied, 327 U.S. 807 (1946); In re Burr Mfg. & Supply Co., 217 F. 16 (2d Cir. 1914); discussed infra Point V(B).

POINT V. THE DISTRICT COURT SHOULD NOT
HAVE VACATED THE ORDER CON-
FIRMING THE SALE, EVEN ASSUMING
ARGUENDO THE NOTICE OF HEARING
TO BE TECHNICALLY DEFICIENT

Appellant has demonstrated that the May 17 hearing was properly conducted and that Hancock had, as Judge Ryan characterized it, "adequate and entirely proper notice" of Dominick's presence. Under these circumstances, Judge Ryan had no alternative, as a matter of law, than to confirm the sale to Dominick's. See In re Gil-Bern Industries, Inc., 526 F.2d 627, 629 (1st Cir. 1975) (It is the "established rule that it is an abuse of discretion for a bankruptcy court to refuse to confirm an adequate bid received in a properly and fairly conducted sale merely because a slightly higher offer has been received after the bidding is closed.")

Dominick's argues in this point that, assuming the notice was somehow deficient -- which was clearly not the case -- the District Court nonetheless was precluded from setting aside the sale to Dominick's because: (1) defects in notice are generally considered mere technicalities where an adequate price is obtained on a sale which is confirmed; (2) this Circuit follows the well established doctrine that courts should strive to maintain the finality of judicial sales and therefore should refuse to set aside judicial sales even where a prospective bid may be higher than the approved sales price.

A. The Claimed Irregularity in the Notice Did
Not Justify the Vacatur of the Confirmed Sale

The District Court's holding that the notice was sufficiently irregular to justify setting aside the confirmed sale to Dominick's flies in the face of the case law of this and other circuits. The law sharply discourages a vacatur of a sale where the basis thereof amounts to a technicality. In re General Insecticide, Co. 403 F.2d 629, 630-631 (2d Cir. 1968); In re Burr Mfg. & Supply Co., 217 F.16 (2d Cir. 1914); accord, Arthur v. Terry, 131 F.2d 73, 74 (5th Cir. 1942); In re Superior Mushroom Growers Corp., 288 F. Supp. 372, 373 (E.D. Pa. 1964).

Once the sale is confirmed, "[t]he standard for setting aside a sale [becomes] stricter than that applied in" attempting to persuade the bankruptcy court to refuse confirmation of the sale. In re General Insecticide Co., *supra*, 403 F.2d at 630. "In the latter the governing principle is to obtain the best price for the bankruptcy estate whereas in the former there is greater emphasis upon finality in judicial sales" *Id.* From this rationale follows the rule, which was perhaps best stated by this Court in In re Burr Mfg. & Supply Co., 217 F.16,19 (2d Cir. 1914):

"After a sale has been confirmed, it may be vacated for cause. But public policy requires there should be stability in judicial sales (cites omitted). They are not to be disturbed for slight causes. Pewabic Min. Co. v. Mason, 145 U.S. 349 ... And courts are not to be astute in finding out objection to them." 217 F. at 19 (emphasis added).*

Accord, In re Rapier Sugar Feed Co., 13 F. Supp. 85 (D.C. Ky. 1935).

In In re Burr, the objectants to a judicial sale alleged, as reasons for setting it aside, faulty notice and an incorrect order of sale. 217 F. at 19. This Court, however, ruled that "if the original order of sale was 'not correct in form', if the proof of notice of sale was 'indefinite', such irregularities and defects were cured by the order confirming the sale." 217 F. at 20.

* See generally 4A Collier, Bankruptcy ¶70.98 [17]:

"The restrictions imposed on the court's discretion to confirm or disapprove a sale are ... judicially imposed, and the range of discretion remains wide, mainly due to the purely administrative element involved. This broad measure of discretion necessarily tends to limit the chances of success upon a review or appeal from the order approving or disapproving the sale. Not only is an abuse of discretion required, but in weighing what constitutes an abuse the reviewing court will confine its intervention to what it feels to be a 'very extreme case'." At 1182 (cites omitted).

For a fuller explanation of the scope of the district court's review, see Point IV, supra.

It is thus settled that defects in a notice of sale, or generally in any aspect of the sale, must be "fundamental" before they may "be availed of as grounds for vacating a confirmed sale." 4A Collier, Bankruptcy ¶70.98 at 1187.

This Court has translated "fundamental" into "tinged with fraud, error or similar defects..." In re General Insecticide Co., supra, 403 F.2d at 631, quoting, 4A Collier, Bankruptcy ¶70.98 [16], 1183, 1184-1194 (14th ed. 1967).*

The burden to demonstrate clearly such fundamental defects is on the objectant, as the courts are "not to be astute" in finding such defects. In Re Burr, supra, 217 F. at 19. Further, the objectants must make their objections when such alleged defects become apparent, not many weeks later as in the case at bar. Belated objections raise the presumption that the alleged defects were not "fundamental".** In re Burr, supra, 217 F. at 20; see also, In Re Marathon

* Examples of such fraudulent proceedings or gross error in the proceedings were cited to by Hancock in his "Memorandum" before the District Court. In re Time Sales Finance Corporation 445 F.2d 385 (3d Cir. 1971), cert. denied, 405 U.S. 917 (1972) (prospective purchaser received no notice of hearing to consider his offer to purchase); Wolverton v. Shell Oil Company, 442 F.2d 666, 669 (9th Cir. 1971) (sale to bankrupt offered "opportunities for skulduggery that make it suspect."); Mason v. Ashback, 383 F.2d 779 (10th Cir. 1967) (fraud); Webster v. Barnes Banking Co., 113 F.2d 1003 (10th Cir. 1940) (fraud).

** "Proceedings to set aside cannot be set in motion for reasons other than defects of such gravity as to 'shock the conscience of the chancellor, and even irregularities of a quite serious kind that might have been, but were not, asserted in the confirmation proceedings are definitely lost and cannot be used as a ground for the request to set aside'." 4A Collier, Bankruptcy ¶70.98 at 1186-1186.1 (emphasis added).

See also, In re Shamokin Lumber & Construction Co., 54 F. Supp. 480 (M.D. Pa. 1944).

Foundry & Machine Company, 239 F.2d 122 (7th Cir. 1956), cert. denied, 353 U.S. 951 (1957) ("gross inadequacy" in sale price insufficient to set aside sale, absent fraud or severe mistake); West Texas Const. Co. v. Nelson, 77 F.2d 754, 755 (5th Cir. 1935).

Thus, in the instant case the absence of an explicit announcement of open bidding in the notice of hearing cannot amount to a "fundamental defect" necessary to set aside a confirmed sale. There can be no such defect when as here, the sale was confirmed without timely objections, and where there has been no showing of prejudice.* In Re General Insecticide Co., 403 F.2d 629, 630 (2d Cir. 1968); Allen v. Union Transfer Co., 152 F.2d 633, 635 (10th Cir. 1945), cert. denied, 327 U.S. 807 (1946) (reversing referee's vacatur of first sale, although two creditors received no notice of sale which brought "inadequate" price; "there were no facts presented showing any unfairness or impropriety ... or raising any doubt as to the integrity of the sale."); West Texas Const. Co. v. Nelson, 77 F.2d 754, 755 (5th Cir. 1935) ("To now set the sale aside because of a slight ambiguity in the notice would put technicality over substance"). Accord, see actual notice cases discussed in Point IB, supra.

B The Confirmed Purchase Price
 For The Property Was More Than
 Adequate As A Matter of Law

The case law clearly demonstrates that a defective

* Judge Ryan explicitly found below that nothing associated with the notice resulted in any prejudice to the estate (488a), to AMF (461a-462a), or to Hancock (474a). 4A Collier, Bankruptcy ¶70.98 at 1185 n.92.

notice by itself, however defective, provides no ground for setting aside a judicial sale. To set aside a confirmed sale in this Circuit, a defect in the proceedings must be associated with a grossly inadequate price which "shocks the conscience of the court."* Indeed, in all of the cases setting aside judicial sales cited below by Hancock or uncovered by Dominick's research, where the sale price was at issue, the price obtained for the property was "grossly inadequate" or "shock[ed] the conscience".**

* E.g., In re General Insecticide, 403 F.2d 629, 631 (2d Cir. 1968); In re Burr Mfg. & Supply Co., 217 F. 16, 21 (2d Cir. 1914); accord, In re Marathon Foundry & Machine Company, 239 F.2d 122, 126 (7th Cir. 1956) cert. denied, 353 U.S. 912 (1957) In re Jewett & Sowers Oil Co., 86 F.2d 497, 498 (7th Cir. 1936); 4A Collier, Bankruptcy, §70.98 at 1186-1186.1.

** A price which is merely "inadequate" is not a basis for setting aside a confirmed sale. In re Marathon Foundry & Machine Co., 239 F.2d 122, 126 (7th Cir. 1956) cert. denied, 353 U.S. 912 (1957). Hancock in his "Memorandum" submitted to the District Court (at 13) suggested incorrectly that an "inadequacy" in price "accompanied with other circumstances having a tendency to cause such inadequacy" will justify setting aside a sale. Quoting from Allen v. Union Transfer Co., 152 F.2d 633, 635 (10th Cir. 1945), cert. denied, 327 U.S. 807 (1946). This language was the most tenuous of dictum, as the Allen court, although finding inadequacy of price, affirmed the district court's reversal of the referee who had set aside the first sale to the petitioner and conducted a new sale. Indeed, Allen supports Dominick's position for in Allen both the district court and the court of appeals found that although:

"No opportunity was afforded ... two creditors who did not have notice to object ... there were no facts presented showing any unfairness or impropriety in the sale to [the petitioner] or raising any doubt as to the integrity of the sale" 152 F.2d at 635.

As the In re Marathon court, supra noted (some 11 years after Allen) no cases "of which we are aware supports the proposition that a confirmed sale will be set aside for gross inadequacy alone or for gross inadequacy coupled with any other

(Footnote continued on next page)

Dominick's paid \$35,000 over the appraised value of the property (447a) which was the price arrived at in negotiations between the Trustees and Hancock (443a-444a, 446a-447a). Efforts by the Trustees over two years to sell the property had failed, during which time the property had lain vacant (478a). Hancock's belated post-hearing bid was only 5.8% higher than the purchase price. These facts preclude a vacatur of the sale. For, where a defective notice or other irregularity has no appreciable effect on the adequacy of the price, the sale will not be set aside. See, e.g., Arthur v. Terry, 131 F.2d 73 (5th Cir. 1942); In re Superior Mushroom Growers Corp., 228 F. Supp. 372 (E.D. Pa. 1964) (to set aside sale because of advertising inaccuracies would have been "grave injustice" where it was not clear that amount of bids were "seriously affected ... especially where the sale price appears to be fair and adequate"). The injury to the estate caused by the defect or irregularity must be severe and detrimental to the estate before the judicial

(Footnote continued from prior page)

circumstance absent fraud or mistake." 239 F.2d at 126 (emphasis added). Hancock therefore confuses the test where the issue is the denial of a confirmation ("inadequacy") with the test where the issue is whether to set aside a sale ("grossly inadequate").

In any event, the law in this Circuit, as discussed above, requires the price to be grossly inadequate before the sale can be set aside. E.g., In re Insecticide, 403 F.2d 629, 630 (2d Cir. 1968); see generally, 4A Collier, Bankruptcy ¶70.98 at 1190-92, n.4. The case cited by the District Court on this point, In re New Strand Theatre, 109 F. Supp. 350 (S.D.N.Y. 1952), aff'd on opinion below, 201 F.2d 889 (2d Cir.) cert. denied, 345 U.S. 995 (1953), is easily distinguished as the sale in Strand was never confirmed (13a).

sale will be upset. See, e.g., In re Jewett & Sowers Oil Co., 86 F.2d 497 (7th Cir. 1936) (mistake in contract of sale caused trustee to convey far more than was intended to be sold).

Even if events subsequent to the May 17 confirmation hearing had suggested a change in circumstances yielding a value significantly different than the \$681,000 price, the District Court was precluded from considering such information. Smith v. Juhan, 311 F.2d 670, 673 (10th Cir. 1962); In re Stanley Engineering Corporation, 164 F.2d 316, 318-319 (3d Cir. 1947), cert. denied, 332 U.S. 847 (1948).

This Court has also recognized the principle that:

"[E]xcept upon the extremest provocation, courts will not upset a judicial sale at auction, upon the ground that a new bidder has appeared who offers more than the knock-down price."

Knight v. Wertheim & Co., 158 F.2d 838, 843 (2d Cir. 1946); In re Burr Mfg. & Supply Co., 217 F. 16 (2d Cir. 1914). Accord, In re Gil-Bern Industries, Inc., 526 F.2d 627 (1st Cir. 1975).

In In re Burr Mfg. & Supply Co., supra, the court rejected the argument that the existence of a bid more than one-third higher than the sales price was evidence that the lower bid was grossly inadequate. The court reversed the order below which had set aside the sale of the bankrupt's property and had ordered a new sale which ultimately resulted in an increase of more than one-third of the original price. The court remanded with instructions to reinstate

the order of sale to the petitioner,* stating that the lower court:

"[S]eem[ed] to have been under the impression that the fact that a larger sum would be realized on a resale was sufficient justification for setting aside the first sale, when taken into consideration with the other circumstances." 217 F. at 20.

The District Court at bar, like the lower court in In re Burr, also seemed "to have been under the [incorrect] impression that the possibility of a larger sum on the resale was sufficient justification for setting aside" the May 17 sale. The District Court stated in its opinion (13a) that:

"A large sum of money is involved in this matter, from the perspective of both the Trustees and the prospective purchasers. It is therefore appropriate to assure that all parties be accurately informed as to the procedures to be followed." (Emphasis added).

and, that:

"As to creditors the situation may be different and notice to some or all seems called for when a sale of this magnitude is contemplated." (15a) (emphasis added).

Neither the Bankruptcy Judge nor the District Court was at liberty, however, to consider events subsequent to the hearing itself in determining whether a resale should be held. See Smith v. Juhan, 311 F.2d 670, 673 (10th Cir. 1962); In re Marathon Foundry & Machine Co., 228 F.2d 594,

* For a similar disposition of a judicial sale improperly set aside by the referee, see Allen v. Union Transfer Co., 152 F.2d 633 (10th Cir. 1945), cert. denied, 327 U.S. 807 (1946) (affirming the district court's reversal of referee's substitution of subsequent purchaser for initial purchaser).

598 (7th Cir.) (dictum), cert. denied, 350 U.S. 1014 (1956).

C. To Affirm the District Court Would
Undermine The Finality Doctrine

An affirmance of the District Court's decision would discourage potential purchasers from participating in open bidding and encourage attempts to upset properly conducted judicial sales by the simple device of offering more money at some later time subsequent to the sale. This result would prevent the finality of judicial sales necessary to create the "stability" required to encourage intensive participationⁱⁿ selling the debtor's assets. In re General Insecticide, 430 F.2d 629, 631 (2d Cir. 1968); In re Burr Mfg. & Supply Co., 217 F. 16, 19 (2d Cir. 1914); In re Stanley Engineering Corporation, 164 F.2d 316, 319 (3rd Cir. 1947), cert. denied, 336 U.S. 847 (1948) (citing cases). As the United States Supreme Court stated in Pewabic Min. Co. v. Mason, 145 U.S. 349, 356 (1892):

"[T]he purpose of the law is that the sale shall be final; and to insure reliance upon such sales, and induce biddings, it is essential that no sale be set aside for trifling reasons, or on account of matters which ought to have been attended to by the complaining party prior thereto ..." (Emphasis added).

In the instant proceedings, the alleged flaws in the notice procedure were indeed "trifling" if not illusory. In addition, Hancock was charged, as a matter of law, with

making any complaints at the May 17 hearing. In re Burr, supra, 217 F. at 20. 4A Collier, Bankruptcy ¶70.98 at 1186-1186.1 quoted at 52, supra. The District Court had no authority to uphold Hancock's belated objections where the effect was to overturn a properly confirmed judicial sale.

CONCLUSION

For the reasons set forth in this Brief, the order appealed from should be reversed in all respects and the May 24 order of Judge Ryan should be reinstated. Reinstatement is in accord with the ruling of Judge Cannella denying a stay pending appeal because of the absence of prejudice to the Appellant's appeal inasmuch as this Court "may direct" the reinstatement of the May 24 order and the sale to Appellant (18a).

The relief requested (and recognized by Judge Cannella) is the same as the relief granted by this Court in In re Burr Mfg. & Supply Co., 217 F. 16 (2d Cir. 1914), and is similar to the relief affirmed in Allen v. Union Transfer Co., 152 F 2d 633 (10th Cir. 1945), cert. denied, 327 U.S. 807 (1946).

This case should therefore be remanded for further

proceedings consistent with reinstatement of the May
24 order of sale.

Dated: New York, New York
September 28, 1976

Respectfully submitted,

Golenbock and Barell

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Docket No. 76-5029

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re

INTERSTATE STORES, INC., formerly
known as INTERSTATE DEPARTMENT
STORES, INC., et al.,

Debtors,

DOMINICK'S FINER FOODS, INC.,

Appellant.

AFFIDAVIT OF SERVICE

GOLENBOCK AND BARELL

ATTORNEYS FOR Appellant

645 FIFTH AVENUE
NEW YORK N Y 10022
TEL: 212-935-9800

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

Alan Watson , being duly sworn, deposes and says: I am not a party to the action, am over eighteen years of age, and am employed by Golenbock and Barell,

~~, under penalty of perjury, states: I am an attorney at law admitted to practice in the State of New York and am associated with Golenbock and Barell,~~

attorneys of record for Appellant herein.
On October 26, 1976 , I served the within personally

Brief of Appellant
upon
Shea, Gould, Climenko, Kramer & Casey
attorney(s) for

in this action, at

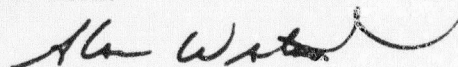
330 Madison Avenue, New York, N.Y.
and upon

Rogers, Hoge & Hills
90 Park Avenue
New York, New York

Krause, Hirsch & Gross
41 East 42nd Street
New York, New York

~~--- the address(es) designated by said attorney(s) for that purpose, ---
by depositing (a) true copy(ies) of same enclosed in (a) postpaid properly addressed wrapper(s) ---
in a (post office) (an official depository) under the exclusive care and custody of the United ---
States post office department within the State of New York. ---~~

Dated: October 27 , 19 76


(Attorney At Law) (Employee)

Alan Watson

Sworn to before me, this
27th day of October , 19 76